

SACRAMENTO, CALIFORNIA

Mar 27 4 41 PM 1988

Determination Pursuant to  
Government Code Section  
11347.5; Title 1,  
California Code of Regulations  
Chapter 1, Article 2

Herbert F. Bolz, Coordinating Attorney  
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Rulemaking and Regulatory  
Determinations Unit

The Office of Administrative Law has concluded that the Department of Corrections has failed to comply with the Administrative Procedure Act in establishing rules and procedures that implement, interpret, or make specific statutory or regulatory law that governs inmate/parolee appeal procedures. The Office of Administrative Law further concludes, however, that some of the provisions of Chapter 7300 are either non-regulatory or are restatements of existing statutes, regulations, or case law.

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THE ISSUE PRESENTED <sup>3</sup>

The Office of Administrative Law ("OAL") has been requested to determine<sup>4</sup> whether Chapter 7300, concerning inmate/parolee appeal procedures, of the Department of Corrections' ("Department") "Administrative Manual" {"Manual"}, is a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore violates Government Code section 11347.5, subdivision (a).<sup>5</sup>

THE DECISION <sup>6,7,8,9</sup>

The Office of Administrative Law finds that Chapter 7300 (1) is subject to the requirements of the Administrative Procedure Act (APA),<sup>10</sup> (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a), except for the small number of provisions that are either non-regulatory or are restatements of existing statutes, regulations, or case law.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.<sup>11</sup> The Legislature has thus entrusted the Director of Corrections with a "difficult and sensitive job":<sup>12</sup>

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ." <sup>13</sup>

Authority <sup>14</sup>

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."<sup>15</sup> Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.<sup>16</sup>

In 1975, the Legislature overturned a 1973 court case<sup>17</sup> (which had found the Department exempt from the APA) by specifically providing that prison administration rules are to be adopted pursuant to the APA.

This 1975 enactment amended Penal Code section 5058, subdivision (a), which currently provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]<sup>18</sup>

General Background

The following undisputed facts and circumstances have given rise to the present Determination.

A Request for Determination was filed with OAL on June 30, 1987, by Patrick T. O'Connell. This Request concerns Chapter

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7300 of the Department's "Administrative Manual," which sets out inmate/parolee appeals procedures. The Manual is approximately 1400 pages, divided into Chapters 100 through 8000.<sup>19</sup> The challenged chapter is 31 pages long. The Requester alleges that a substantial number of the rules contained in Chapter 7300 are "regulations" within the meaning of Government Code section 11342, subdivision (b), and therefore must be adopted pursuant to the APA.

On March 28, 1988, the Department filed a Response to the Request with OAL. In addition to other arguments<sup>20</sup> (which we address in note 20), the Department asserts in this Response that "[t]hese rules provide a convenient collection of applicable court cases, statutes, regulations from the California Code of Regulations, internal management procedures and forms."<sup>21</sup>

Before reviewing the challenged rule for compliance with the APA, and before addressing the Department's contentions, we will discuss the background and significance of Chapter 7300. Initially, we note that prison administration involves a number of significant public interests. For instance, as noted in 1987 OAL Determination No. 3, which concerned the Department of Corrections' Classification Manual:

"The classification process involves the balancing of two significant public interests: (1) the need to protect the general public, departmental staff and other prisoners from inmates who are prone to violence or likely to escape or both; and (2) the need to control expenditure of public funds by minimizing the number of inmates who are confined in maximum-security, intensively supervised environments." [Emphasis added.]<sup>22</sup>

The nature of the public interests involved in the matter currently before us is reflected in sections 7300 and 7301 of the "Administrative Manual," which are respectively titled "Purpose" (of the Inmate/Parolee Appeal Procedure) and "Exhaustion of Administrative Remedies." (Sections 7300 and 7301 are quoted in note 23.)<sup>23</sup> These interests are listed below:

1. The need to resolve inmate grievances quickly and fairly within the prison system, thus making it unnecessary to expend significant resources litigating such matters in state or federal court.
2. The need to provide feedback to management on local practices which may be unnecessary or counterproductive.

The most obvious benefit of an effective inmate grievance system would appear to be a reduction in litigation expenses. As the Department points out in section 7301, according to the California Court of Appeal, inmates may generally not

file state court habeas corpus petitions contesting institutional punishment (e.g., 30 days administrative segregation for violating a disciplinary rule) or conditions of confinement (e.g., overcrowding) unless a grievance has first been processed through three levels of review.<sup>24</sup> In other words, failure to exhaust administrative remedies (that is, failure to file an inmate appeal with the local division head, the local warden, and the Director) ordinarily results in dismissal of the state habeas corpus petition.<sup>25</sup>

Inmates also have the right to file civil rights actions<sup>26</sup> in federal court concerning institutional punishment or conditions of confinement. Though the general rule has been that exhaustion of administrative remedies requirements do not apply to such actions, Congress created a partial exception to this rule in 1980 in the Civil Rights of Institutionalized Persons Act, which provides that a federal judge may continue<sup>27</sup> a prisoner civil rights action for up to 90 days to permit "exhaustion of such plain, speedy, and effective administrative remedies as are available."<sup>28</sup>

This is the context in which we approach the dispositive issues.

## II. DISPOSITIVE ISSUES

There are two main issues before us:<sup>29</sup>

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure,  
. . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

With respect to Chapter 7300, the answer to both parts of this inquiry is "yes," except where there is a restatement of an existing statute, regulation or case law.<sup>30</sup> These restatements do not therefore (1) establish, modify or supplement a rule of general application, or (2) implement, interpret or make specific the law enforced or administered by the Department or govern the Department's procedure.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>31</sup> It has been judicially held that "rules significantly affecting the male prison population" are of "general application."<sup>32</sup> Chapter 7300 is just such a rule. It is a rule of general application significantly affecting the prison population in the custody of the Department.

Chapter 7300 also implements, interprets, or makes specific statutory or regulatory law concerning inmate/parolee appeal procedures that are enforced or administered by the Department. For purposes of analysis, we will focus on three particular provisions of Chapter 7300 as examples of the numerous regulatory provisions in the chapter.<sup>33</sup>

Example No. 1: Chapter 7300, section 7308

Section 7308, Appeal Screening Procedure,<sup>34</sup> provides the following:

"(a) In order to maintain the efficiency of the appeal procedure, the appeals coordinator, district administrator, or another staff member as delegated, will screen all appeals prior to acceptance and assignment for review. This discretionary decision should not be construed in any manner that would place unreasonable restraints on the inmate's or parolee's right to appeal.

"(b) Discretion may be used in refusing to accept a given appeal for any of the following specific reasons:

"(1) The action or decision being appealed is not within the jurisdiction of the Department of Corrections.

"(2) The inmate or parolee has resubmitted another appeal on an action or decision currently under appeal review at any level, or on which the appeal action has been previously completed.

"(3) The inmate or parolee is appealing an anticipated action or decision.

"(4) The inmate or parolee has not attempted to resolve the problem informally prior to filing the appeal and the appeals coordinator has determined that the inmate or parolee can and should do so.

"(5) The CDC Form 602 has not been adequately completed or the needed documents have not been attached. Examples include: Insufficient information, no action requested, form not signed, or CDC 115 or chronos not attached. Extreme caution will be exercised not to screen out appeals submitted by inmates or parolees who have difficulty in expressing themselves in writing or whose primary language is not English.

"(6) There has been too great a time lapse between when the action or decision occurred and when the appeal was submitted. The appeals coordinator will be guided by Section 7302 and, in addition, make sure that the inmate or parolee had, in fact, the opportunity to file in a timely manner.

"(7) When a group of inmates have collectively initiated individual appeals on the same issue,

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thereby placing a burden on the appeals system (see Section 7307, Multiple Appeals, subsection (c)).

"(8) An inmate or parolee may not appeal on behalf of another inmate or parolee.

"(c) When it is determined that an appeal will not be accepted for review, the appeals screening form [( ) CDC Form 695, Rev. 5/83) will be completed, attached to the CDC Form 602, and returned to the inmate or parolee. Clear instructions on information needed or appeal route to be taken will be stated.

"(d) The screened out appeal will first be logged in on CDC Form 645, given an appeal number, and then logged out, and returned to inmate/parolee, noting the date of the transaction with a number keyed to the reason for the action for future identification purposes.

"(e) . . . ."

Section 7308 implements, interprets, or makes specific section 3003 of Title 15 of the CCR. Section 3003 (titled "Appeals") states:

"Every person under the jurisdiction of the Department of Corrections has the right to appeal decisions, conditions, or policies affecting his or her welfare. Each warden, superintendent, and parole region administrator must provide a system whereby an inmate or parolee may request and receive administrative review of any problem or complaint. Such reviews will involve upper-level staff and will insure that the complaint receives prompt, courteous and considerate attention.

"(a) Administrators may delay or authorize a delay in implementing decisions or ordered actions affecting an inmate or parolee upon an appeal of the decision or action where the delay will present no threat to institution security, the safety of persons, or create serious operational problems.

"(b) Although department staff members and inmates and parolees are encouraged to attempt informal resolutions of any problem or complaint, a staff member may not participate in the decision process during the formal review of his or her own actions after an appeal is filed.

"(c) There will be no form of reprisal against an inmate or parolee for filing an appeal."



Example No. 2: Chapter 7300, section 7315

Section 7315, Emergency Appeals,<sup>35</sup> states:

"(a) An emergency appeal is defined as a matter regarding which disposition according to the regular time limits would subject the inmate/parolee to a substantial risk of personal injury, or cause other serious and irreparable harm to the inmate/parolee. Examples include but are not limited to:

"(1) The need for protective custody;

"(2) A decision to transfer the inmate to an institution housing a known identified enemy, or;

"(3) Request for review of a serious disciplinary action in which good time credits were taken and the inmate had an imminent parole date.

"(b) The inmate/parolee will substantiate in writing the need for emergency handling of the appeal and send it directly to the appeals coordinator, who in turn will determine whether an emergency exists and so inform the inmate/parolee. If not accepted as an emergency appeal, the appeal will be returned to the inmate/parolee for informal resolution or accepted for regular formal processing.

"(c) When accepted as an emergency appeal, the appeals coordinator or designee will interview the inmate/parolee and a second level response will be completed within five working days.

"(d) If the inmate then requests a director's level review, the appeals coordinator will facilitate the transmitting of the appeal, Attention: chief, appeals section. The director's decision will be based on a review of the written data submitted, and will be completed within five working days of receipt."

Section 7315 also implements and interprets Title 15, CCR, section 3003 (quoted above under Example No. 1).

Example No. 3: Chapter 7300, section 7333

Section 7333, Disciplinary Appeal Decisions,<sup>36</sup> provides:

"(a) Each disciplinary appeal is to be reviewed on the basis of conformance with the provisions of the Director's Rules and Regulations and the classification manual, inmate discipline.

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"(b) If, in the course of disciplinary action, the inmate has not remained in his existing housing and program status and there is an absence of good reason for this change, the reviewer may advise the appropriate staff member of the problem and request a return to former status.

"(c) The disciplinary finding and disposition may be vacated and a new hearing ordered if due process requirements were not met which then resulted in less than a fair hearing. Examples include:

(1) the inmate did not receive a copy of the charge and all other nonconfidential reports at least 24 hours prior to the hearing [as required by Title 15, CCR, section 3320].

(2) In a Serious [orig. emph.] CDC Form 115, when an investigative officer was not assigned or not waived by the inmate, or did not properly carry out his or her duties, and it appears that such an investigation would have been helpful to the inmate.

(3) When on a Serious [orig. emph.] CDC Form 115, the inmate was denied witnesses who would have contributed significant information at the hearing, or where security was an issue, denied admission of witness statements.

(4) The inmate was denied the opportunity to speak in his or her own defense.

(5) The inmate was not able to fully participate in the hearing and was not assigned staff assistance or a language interpreter.

"(d) The appeal reviewer may make a determination that the disciplinary finding was not supported by the evidence presented at the hearing and may either vacate the finding and order a new hearing or dismiss the charge. Dismissal of the charge is appropriate when a new hearing would not be likely to produce any additional substantial information.

"(e) If failure to follow procedural requirements, such as time limits, has prevented an inmate from having a fair hearing, the proper remedy would ordinarily be to set aside the finding and to order a new hearing. However, if the passage of time would prevent holding a fair hearing at the time of the appeal review, such as when crucial witnesses whose presence are necessary for a fair hearing have been released from custody or are no longer employed by the department, it would be proper

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to dismiss the charge and terminate the disciplinary action.

"(f) If the inmate has received punishment disproportionate to the offense, the appeal reviewer may modify this disposition.

"(g) When disciplinary findings are dismissed or modified, it is the responsibility of the appeal reviewer to see that the CDC Form 115 is removed from the inmate's central file or make the changes as mandated by the appeal decision.

"(h) Following the appeal review, in every instance where the procedure requirements were not met, the staff member(s) involved are to be so advised by the appeals coordinator in order to minimize future procedural error."

Section 7333 implements and interprets Penal Code section 5054 and section 2932, subdivision (d). Section 5054 provides the following:

"The supervision, management and control of the State prisons, and the responsibility for the . . . custody, . . . [and] . . . discipline . . . of persons confined therein are vested in the director [of Corrections]." [Emphasis added.]

Section 2932, subdivision (d) provides in part:

"If found guilty [of misconduct] the prisoner . . . may appeal the decision through the Department of Corrections' review procedure, . . . " [Emphasis added.]

Section 7333 also implements, interprets, and makes specific Title 15, CCR, section 3325, subdivision (a), titled "Appeal of Disciplinary Actions," which provides:

"Regular Disciplinary Appeals. An inmate may appeal any disciplinary decision or disposition, including the denial of credits, or the process itself by filling out an Inmate/Parolee Appeal Form, CDC Form 602, and submitting it to the institution appeals officer within 15 days of the action or decision being appealed. Any person who has participated in the disciplinary process which resulted in the appeal may not function as an appeal reviewer in that specific case."

WE THEREFORE CONCLUDE THAT CHAPTER 7300 OF THE DEPARTMENT'S "ADMINISTRATIVE MANUAL" IS A "REGULATION" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

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SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.<sup>37</sup>

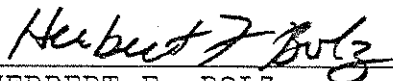
The Department contends that Chapter 7300 "provide[s] a convenient collection of . . . [inter alia,] internal management procedures . . . ."38 The Department, however, has neither listed nor provided examples of material that arguably falls within the internal management exception. OAL has nonetheless concluded that section 7317, Quarterly Appeals Report, falls within the "internal management" exception, and therefore, is not subject to the requirements of the APA. This provision affects only employees of the issuing agency (the Department), and thus is exempt from APA requirements pursuant to Government Code section 11342, subdivision (b).

As discussed above and in note 33, however, most of the rules set forth in Chapter 7300 are standards of general application which implement, interpret or make specific the law administered or enforced by the Department. These rules fall neither in the internal management exception<sup>39</sup> nor any of the other recognized APA exceptions.

### III. CONCLUSION

For the reasons set forth above, OAL finds that Chapter 7300 of the Department's Administrative Manual (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a), except for the small number of provisions that are either non-regulatory or are restatements of existing statutes, regulations, or case law.

DATE: April 27, 1988

  
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- 1 This Request for Determination was filed by Patrick Thomas O'Connell, B-97941 (Patterson), CSP-FOL 2-A1-06, Represa, CA 95671. (On December 15, 1987, OAL received notice of change of name of Thomas C. Patterson to Patrick Thomas O'Connell.) The Department of Corrections was represented by Marc Remis, Staff Counsel, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.
  
- 2 The version of Chapter 7300 that is the subject of this Request is dated June 6, 1983. OAL is limiting its review and determination to this version. According to the Requester, this is the version that was given to him when he asked to see the "Administrative Manual" at his institution and is the one that he is challenging. Also, we express no opinion on whether any of the forms or other provisions of the "Administrative Manual" referred to in Chapter 7300 are subject to the APA because they were not duly submitted for review in this Request for Determination.
  
- 3 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Regulatory Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promul-

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gated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute. In Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 244 Cal.Rptr. 693 (Cal.App. 2 Dist.), the court found that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism."

- 4 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121(a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."  
[Emphasis added.]

- 5 Government Code Section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

- 6 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Regulatory Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

- 7 One comment was received by Donald W. Crisp, C-87517, Building 11-120-L, P. O. Box 4000, Vacaville, CA 95696-4000, supporting the Requester. The Department submitted a Response to the Request for Determination. Both were considered in making this determination.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected rulemaking agencies to submit responses to requests. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

- 8 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subdivision (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
- 9 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on p.1.
- 10 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 11 Penal Code section 5000.
- 12 Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778; 781.
- 13 Penal Code section 5054.
- 14 We discuss the affected agency's rulemaking authority (see



Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 15 Government Code section 11342, subdivision (a). See Government Code sections 11343 and 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
- 16 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 17 American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

As noted in 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Regulatory Notice Register 86, No. 16-Z, April 18, 1986, p.

B-13; typewritten version, p. 6, Procunier was to a significant degree further overruled by Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1.

- 18 Section 3 of Statutes of 1975, chapter 1160, page 2876 provided:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections or the Adult Authority prior to the effective date of this act, shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976."

- 19 Other portions of this Manual were found to be partly non-regulatory and partly regulatory in two prior OAL Determinations. The first Determination concerned sections 7810 through 7817 (governing prison law libraries). (See 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, pp. 872-900.) The second Determination concerned chapters 2900 (polygraph examinations) and 6500 (dental services), and section 6144 of chapter 6100 (inmates' private physicians). (See 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, pp. 720-741.

Chapter 4600 of the Administrative Manual, which sets forth detailed provisions governing the amount and type of personal property which prisoners may possess in their cells, was challenged in Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122. The court found that Chapter 4600 must be adopted in compliance with the APA before it could be valid and enforceable. The court relied on the reasoning used by the Ninth Circuit Court of Appeals in Hillery v. Rushen (9th Cir.1983) 720 F.2d 1132, which also stated that Chapter 4600 was invalid and unenforceable unless adopted pursuant to the APA. In general, the Hillery court stated that the Director of Corrections must comply with the procedural requirements of the California APA.

- 20 The Department asserts that OAL should "abstain from making a determination on whether or not . . . Chapter 7300 constitutes 'a regulation'" (Agency's Response, p. 1) because the Requester has unlawfully attempted to amend his Request. The Department argues that "in paragraph 2 on page two of [the Requester's] 'public comments,' [the Requester] states that only [certain] sections and/or subsections are believed to be regulatory in nature and, therefore, are challenged as being violative of Government Code section 11347.5 . . . ." (Id.;

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emphasis added.) Actually, the Department quotes the Requester out of context. The lead-in paragraph to paragraph 2 states:

"I am the requestor [sic] in [this request for determination]. . . . The following are my comments regarding the entire chapter under consideration for determination:

1. After an examination of the chapter, the following sections and/or subsections are believed to be non-regulatory in nature and/or reiterative of existing statutes/regulations/caselaw . . . .
2. After an examination of the chapter, the following sections and/or subsections are believed to be regulatory in nature and, therefore, are challenged as being violative of Government Code Section 11347.5, [subdivision] (a) . . . ." [Emphasis added.]

OAL views the above as merely a comment by the Requester on the pending Request. As shown above, there is no apparent intent by the Requester to amend his initial Request. Hence, OAL does not agree with the Department on this point. Even if the Requester had attempted to amend his initial Request, OAL would not have permitted such an amendment in light of the procedural requirements set out in the OAL regulations governing the regulatory determination process. See Title 1, CCR, sections 122 and 123 (if a request for determination meets the filing requirements and OAL has accepted the request, OAL will issue a determination whether the challenged rule [the enactment submitted pursuant to section 121, subdivision (a)(3) or (4)] violates Government Code section 11347.5).

The Department further asserts that Chapter 7300 "has undergone major additions, deletions, rewriting, and renumbering every two or three years; revisions are dated March 8, 1980, June 6, 1983, May 6, 1986, and January 7, 1988. . . . [S]ections 7301(a) through 7343(a), non-inclusive, which are of 1980 or 1983 vintage do not currently exist in [Chapter 7300]. For example, sections 73[2]6 through 7329 and 7334 through 7399 are empty and reserved for future use." The Department, therefore, argues that the 1983 version of Chapter 7300 is "not being 'utilize[d], enforce[d] or attempt[ed] to [be] enforce[d]'. Although these sections were 'issue[d]' either on March 8, 1980 or June 6, 1983, they were expressly withdrawn and superceded on June 6, 1983 or May 6, 1986, respectively."

OAL is not persuaded by this argument. First, Government Code section 11347.5 declares: "No state agency shall issue

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. . . any guideline, . . . manual, instruction, [or] standard of general application . . . which is a regulation . . . ." The issuance of Chapter 7300, without more, violates Government Code section 11347.5. In its Response, the Department admits that it issued Chapter 7300. For a rulemaking agency to declare that a challenged rule has been withdrawn or superceded does not terminate OAL's legal duty under the CCR to respond in timely fashion to a duly-filed request for determination. In any event, OAL also notes that although minor changes have been made to Chapter 7300 since 1983, that Chapter 7300 has not been fundamentally altered. In fact, several sections of the 1983 version of Chapter 7300 are repeated in the 1988 version of the chapter. For example, section 7309 of the 1983 version is repeated almost verbatim in section 7305 of the 1988 version.

Section 7309 (1983 version), Abuse of the Appeal Procedure, states:

"(a) The appeals coordinator has the discretion to take the following actions when it has been determined that the procedure is being subjected to abuse:

(1) If the same person submits a large number of appeals within a short time frame, thereby overloading the system and threatening the orderly and timely processing of appeals, the first appeal will be accepted, the others logged and set aside with no action taken. The appeals coordinator may consult with the chief, appeals section, to determine if a letter of instruction to the inmate should be prepared.

(2) Knowingly making false or slanderous statements may result in a disciplinary charge under Director's Rule 3021, Falsification of Records and Documents.

(3) Appeals, containing gross derogatory or obscene statements may be rejected with the additional option of filing a disciplinary charge under Director's Rule 3004, Rights and Respect of Others.

(4) If the nature of the appeal problem and action requested is not understood or is obscured by the volume of attached material, the appeal may be rejected with instruction to the inmate for written clarification and that additional comments be summarized on one page and resubmitted.

(5) If the person filing an appeal then refuses to cooperate in the appeal investigation through refusing to be interviewed or comply with the letter of instruction, the appeals coordinator may then cancel the appeal noting the behavior on the appeal form and returning it

to the sender."

Section 7305 (1988 version), Abuse of the Appeal Procedure, states:

"The appeals coordinator shall have the discretion to take the following actions when it has been determined that the procedure is being subjected to abuse:

(1) If an inmate/parolee submits a large number of appeals within a short time frame, thereby overloading the system, and threatening the orderly and timely processing of appeals, the first appeal shall be accepted, the others logged and set aside. The appeals coordinator shall consult the Chief, Appeals Section, to determine if a letter of instruction to the inmate shall be prepared. The appeals that were 'set aside' shall be processed as time permits depending on the individual inmate or parolee appeal activity.

(2) Knowingly making false statements may result in a disciplinary charge under Director's Rule 3021, Falsification of Records and Documents.

(3) Appeals containing gross derogatory, slanderous, or obscene statements shall be screened out using reason #5 on the Appeal Screening CDC Form 695 notifying the appellant of the staff option to file a disciplinary charge under Director's Rule 3004, Rights and Respect of Others.

(4) If the nature of the appeal problem and action requested is not understood or is obscured due to voluminous description of the problem, the appeal shall be screened out using reason #5 on CDC Form 695 instructing the appellant to more clearly state the grievance utilizing the 'one additional page' outlined in CDC Form 602 instructions.

(5) If an inmate filing an appeal refuses to cooperate in the appeal investigation through refusing to be interviewed or complying with the instructions, the appeals coordinator shall cancel the appeal noting the behavior on the appeal form and returning it to the sender."

The Department also makes a point of noting that the 1988 version of sections 7326 through 7329 are "empty and reserved for future use." In response, OAL notes that sections 7326 through 7329 of the 1983 version are also "reserved for future use." (See Chapter 7300 (1983), table of contents (referred to as the "Index").

Continuing with the same reasoning, the Department asserts that the issue of whether or not Chapter 7300 is an underground regulation is moot. OAL finds that the issue is not moot. Chapter 7300 remains substantially unchanged since the 1983 version, hence, OAL will continue with its review of Chapter 7300 (1983 version) and issue a determination pursuant to the Request received from the Requester.

The final point made by the Department in support of its argument that OAL should abstain from making this determination is that it "is the burden of the requestor [sic] to identify an existing allegedly illegal rule. See Title 15 [sic], California Code of Regulations, section 122." The Department apparently feels the Requester has not met this burden. This alleged "burden," however, is set out neither in Title 1, CCR, section 122, nor anywhere else. The words "exist" or "existing" do not appear in section 122.

OAL found that the Requester had met all pertinent filing requirements. Pursuant to section 123 of Title 1, "All requests for determination which meet the requirements of section 122 . . . shall be considered by [OAL] . . . ." Once a Request has been accepted, OAL will issue a determination. If there is an issue of whether or not the challenged rule has been repealed or withdrawn, i.e., no longer exists, this issue will be appropriately addressed in the determination. See 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, pp. B-74--B-103; see also 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-21; typewritten version, p. 6.

OAL is not persuaded by any of the above arguments as presented by the Department.

21 Agency's Response, p. 2.

22 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-82; typewritten version, p. 11.

23 "Section 7300. Purpose. The departmental inmate/parolee appeal procedure has been established for the purpose of:

"(a) Providing a vehicle for review of departmental policies, procedures, practices, conditions, incidents, and actions which may adversely affect an inmate's welfare, status or

program.

"(b) Providing for the resolution of grievances at the lowest possible level with a timely response to the appellant.

"(c) Affording the successful grievant a meaningful remedy focused on correcting the problem.

"(d) Auditing the internal processes and operation of the department, to identify, modify or eliminate practices which may not be necessary or may impede the accomplishment of correctional goals. (Fed. St. 40.5, 40.6.)"

"Section 7301. Exhaustion of Administrative Remedies.

"(a) In re Muszalski, 52 [Cal.App.3rd] 500, holds that the Department of Corrections inmate appeal procedure provides '...viable, efficacious administrative remedies which must be exhausted by an inmate before resorting to a petition for habeas corpus in the courts.' This means that normally before a court will consider a petition for a writ of habeas corpus filed by an inmate or parolee over a grievance with the department, he or she must first use the departmental appeal procedure. The opinion In re Muszalski does not apply to court actions challenging the criminal proceedings leading to sentencing to the department.

"(b) The Civil Rights of Institutionalized Persons Act, Pub. L 96-247, 94 Stat. 349 (42 U.S.C. 1997) provides that a court may continue for up to 90 days, a case filed under 42 U.S.C. 1983 by a person confined in a departmental institution in order to require the inmate to use the departmental appeal procedure. Before a court may do this, either the court of the U.S. Attorney General must determine that the procedure is in substantial compliance with the standards promulgated by the Attorney General, and the case can be resolved by the use of the appeal procedure.

24 In re Muszalski (1975) 52 Cal.App.3d 500, 125 Cal.Rptr. 286 (specifically finding that earlier versions of Administrative Manual chapter 7300 and associated documents had created an efficacious and viable administrative remedy). The Muszalski court noted that the APA did not apply to the Department: this case was decided prior to the 1976 amendment to Penal Code section 5058 and prior to the 1982 enactment of Government Code section 11347.5.

25 E.g., In re Arias (1986) 42 Cal.3d 667, 230 Cal.Rptr. 505.

- 26 42 U.S.C. section 1983.
- 27 Francis v. Marquez (9th Cir. 1984) 741 F.2d 1127 ("continue," not "dismiss").
- 28 42 U.S.C. section 1997e (if it is determined that the grievance procedure meets certain standards).
- 29 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 3 to today's Determination.
- 30 For example, section 7334, Disciplinary and Parole Rescission Hearing Appeal Procedure, subdivision (d) states:
- "The inmate must file his appeal within 15 working days from the date of the action. The central office staff will have 20 working days in which to respond."
- Title 15, CCR, section 3325, subdivision (c), "Combined Disciplinary and Parole Rescission Appeals," provides in part:
- ". . . when a combined disciplinary and parole rescission hearing has been held, any aspect of the hearing . . . may be appealed . . . [to] the institution appeals officer within 15 days of the date of the action or decision being appealed. The appeal . . . will be sent to the Chief, Inmate Appeal Section, [Department], for a combined review and decision by the department and the board. A decision on the appeal should normally be transmitted to the inmate within 20 working days from the date of receipt of the appeal by the Chief of the Appeals Section. . . ."
- 31 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 32 Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.



33 Below are additional examples of the numerous regulatory provisions contained in Chapter 7300. Each provision meets both prongs of the statutory definition of "regulation":

1. Section 7302 (b) -- Requires that "before an appeal will be accepted for formal processing, the inmate/parolee must make every effort to informally solve the problem with the appropriate staff member." (Emphasis added.) The effort must be described and confirmed on the CDC 602 Appeal Form. Staff are expected to complete the informal response within five working days. Title 15, CCR, section 3003, subdivision (b) merely "encourage[s]" staff and inmates/parolees to "attempt informal resolutions of any problem or complaint."
2. Section 7304 -- Describes the three levels of review; the first two levels are in the institution or parole region, with the third review at the director's level. Defines the director's decision as final and therefore exhausts all administrative remedies available in the Department. Describes situations when the first level may be bypassed.
3. Section 7305 -- States that copies of the Administrative Manual, Chapter 7300, Appeals, and the institution appeal procedure will be filed and maintained in each inmate law library. A Spanish translation of Chapter 7300 will also be available in the library. This section also states that services will be provided when necessary to make the appeal procedure accessible by impaired and handicapped inmates.
4. Section 7306 -- Provides the preparation procedure for correctly and completely filing an appeal on the required forms; otherwise, the appeal may be rejected. States that an inmate/parolee may not submit an appeal on behalf of another inmate/parolee.
5. Section 7307 -- Describes the process for handling multiple appeals on a similar issue, i.e., when will the appeals be handled individually and responded to individually, when will only one appeal be accepted and the others rejected.
6. Section 7309 -- Describes several actions which may be taken when it has been determined that the appeal procedure is being subjected to abuse. See note 20 where this section is quoted in full.
7. Section 7314 -- Establishes the time limits for appeal responses at each level of review for non-disciplinary actions.
8. Section 7330 -- Describes the appeal processing when two departmental jurisdictions are involved (i.e., inmate files

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an appeal at one institution and is then transferred to another) and the inmate's participation.

9. Section 7331 -- Describes the use of the "expedited hearing procedure review" prior to a Serious disciplinary hearing or a segregation placement classification hearing, i.e., an inmate may request an appeal of the denial to have access to confidential material in his or her file. Sets forth other "denials" an inmate may appeal and receive an expedited review. Sets forth grounds for rejecting the appeal. States that this expedited appeal cannot be appealed to the director's level.

10. Section 7332 -- Provides how far up the appeal levels a Serious disciplinary action and an Administrative disciplinary action may be appealed. Provides when the first level of review may be bypassed.

11. Section 7335 -- Describes the procedures for disciplinary rehearings when an inmate has been transferred before the entire disciplinary process has been completed. In determining which method to use, the staff should consider the following guidelines: severity of the infraction, the level of hearing required, whether or not a release date is involved, and the degree of security risk the inmate poses, if transfer is being considered. States that inmate witnesses will not be transferred to participate in the rehearings. Sets the time limits for which rehearings will be held. Supplements Title 15, CCR, section 3320.1.

12. Section 7337 -- Describes the procedures for requesting and processing an appeal for the denial of a request to be transferred or to not be transferred.

13. Section 7338 -- Describes the procedures for filing and processing an appeal for lost property or damage. Describes the steps to take to appeal to the second level and to file a Board of Control claim for payment for the loss or damage.

14. Section 7339 -- Describes the procedures for appealing the length and conditions of parole established by the Department. Prescribes the contents of the appeal and sets the time limits for an appeal response. This section supplements Title 15, CCR, section 3500, which states that "[p]ersons committed to the Department who are [paroled] shall conform to the applicable rules established by . . . the Board of Prison Terms . . . ." Title 15, CCR, section 2526 of the Board of Prison Terms states that "[p]risoners whose length and conditions of parole were established by the department [of Corrections] shall first appeal through department appeal procedures (Title 15, [CCR], Section 3003)." Section 3003 is quoted in the text.

15. Section 7340 -- Describes the procedures for appeals of release to county of residence parole decisions.

This list is not intended to be an exhaustive list of all the regulatory provisions contained in Chapter 7300.

- 34 The 1988 version of this section, with the same title, is located at section 7306. The 1988 version has minor non-substantive changes, but otherwise is substantially the same.
- 35 Section 7315 is repeated, without any substantial changes, in the 1988 version of Chapter 7300.
- 36 Section 7333 is repeated, without any substantial changes, in section 7316, subdivision (e), of the 1988 version of Chapter 7300.
- 37 The following provisions of law may also permit rulemaking agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:
  - a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
  - c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
  - d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
  - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
  - f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed

without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations (available for purchase from OAL, (916) 323-6225, ATSS 8-473-6225) is a helpful guide for locating such information.

38 Agency's Response, p. 2.

39 As noted above, general rules adopted to interpret, implement and make specific laws enforced by the Department which significantly affect the prison population must generally be adopted pursuant to the APA. Further, the grievance rules presently under review clearly involve matters of serious consequence involving important public interests--the interests identified in the text under the heading "General Background." See 1988 OAL Determination No. 3 (Board of Control, March 7, 1988, Docket No. 87-009), California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, p. 864; typewritten version, p. 10, citing Poschman v. Dumke (1973) 31 Cal.App.3d 932, 944, 107 Cal.Rptr. 596, 603.